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No. 86-1981

In The
Supreme Court of the United States
October Term, 1986

Sun Ship, Inc.,
Petitioner,

v.

California and Hawaiian Sugar Company
and
Halter Marine, Inc.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Should this Court depart from the usual rule that state-law and factual issues are not reviewable and review a case that:

1. Raises primarily factual arguments;

2. Concerns only issues of state law, which the Circuit Court expressly applied;

3. Has no significance whatever for federal jurisprudence;

4. Addresses a fact pattern that has only arisen twice before in the reported case law; and

5. Will affect only the parties to this case?

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INTRODUCTION

The Petition is frivolous. It represents Sun's blind refusal to accept the uniform judgment of three judicial bodies that it must perform its promises. It is nothing more than a rehash of the same tired arguments about the facts and state contract and damages law that were considered and rejected by the special master, the district court and twice by the court of appeals. Sun's melodramatic claims that this is a case of constitutional significance (Petition ("Pet.") at 2, 9, 13) or one that upsets the

foundations of contract law (Pet. at 9, 11) or that is so "egregiously in conflict with an important local law as to call for the Court's power of supervision" (Pet. at 9, 27), are so plainly wrong that they are silly.

And Sun knows that its arguments don't belong in this Court, for it cites authorities that say so. (Pet. at 9) Moreover, pursuing meritless, frivolous appeals like this one seems to be habitual with Sun. In the strikingly similar case of *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59 (3d Cir. 1986), the court found that Sun had brought a frivolous appeal, and sanctioned it for wasting plaintiff's and the Court's time.

Unfortunately, Sun refuses to learn from experience. Its Petition is entirely unwarranted. Accordingly, C and H requests that the Court deny Sun's frivolous petition and grant C and H's motion for damages.

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STATEMENT OF THE CASE

C and H is a non-profit agricultural cooperative owned by Hawaii's sugarcane growers. C and H transports the raw sugar to mainland refineries for refining and marketing. In 1978, C and H was advised that three vessels it was using to transport raw sugar from Hawaii to the mainland would no longer be available after January 1, 1981. After studying the alternatives, C and H determined that the most economic way to replace those vessels and serve its transportation needs was to build an integrated tug-barge ("ITB"). In order to move the anticipated sugar crop, C and H needed the ITB by the second quarter of 1981.

Sun is a wholly-owned subsidiary of Sun Company, Inc., which also owns Sun Oil Company. Although Sun had been in the shipbuilding business for some 67 years, when C and H contacted it about the ITB project, Sun advised C and H that it was rededicating itself to that business and expected to become the premier shipbuilding company in the United States.[1] Sun also assured C and H that it could meet the delivery schedule C and H required.

On November 14, 1979, following extended negotiations, C and H and Sun entered into a contract for the construction of the barge (the "Barge Contract"). Simultaneously, C and H entered into a contract with Halter to construct the tug (the "Tug Contract") and all three parties entered into an Interface Agreement in which Sun undertook to connect ("mate") the barge and tug. Under the Tug Contract C and H agreed to pay Halter $20,350,000; Halter agreed to construct the tug and make it available to Sun at its Chester, Pennsylvania shipyard on or before April 30, 1981, or to pay $10,000 in liquidated damages for each day it was late. (App. pp. 41a-44a) The Barge Contract required C and H to pay Sun $24,405,000. In return, Sun promised to construct the barge, connect it to the tug and deliver it to C and H by June 30, 1981, or to pay liquidated damages of $17,000 per day for late delivery. (App. pp. 28a-29a, 31a-32a) Sun itself wanted a liquidated damages clause in the Barge Contract to limit its exposure for breach. As both the district court and the court of

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[1] This purported "rededication" was short lived. In January 1981, Sun left the new ship construction business altogether and "rededicated" itself to ship repair, ship conversion and industrial products. As part of this change, Sun subcontracted the barge work to Bath Iron Works and sold its shipyard in Chester, Pennsylvania.

appeals found, the liquidated damages figure of $17,000 per day was reasonable both as an advance estimate of the damages C and H anticipated it would suffer if the ITB was late (these exceeded $27,000 per day), and as a retrospective reflection of the damages that actually were suffered by C and H. (App. pp. 5a, 9a-10a, 18a, 24a-25a)

Sun's obligation under the Barge Contract to complete the barge by June 30, 1981 was independent of Halter's obligation to perform under the Tug Contract (App. pp. 4a, 19a, 22a, 29a, 31a), and during the contract negotiations Sun was understandably concerned that it not be subject to liquidated damages where it had done all it could to perform its obligations but was unable to complete performance on time because Halter had not made the tug available. The Barge Contract specifically addressed this concern; it provided that Sun would be entitled to an extension of its delivery date (and therefore avoid having to pay liquidated damages) by the number of days its performance was actually delayed by unavailability of the tug. (App. pp. 25a, 30a-31a)

Sun immediately fell behind schedule in building the barge. In violation of the contract, on February 11, 1981, Sun unilaterally subcontracted construction of the barge to Bath Iron Works in Maine. In any event, neither Sun nor its subcontractor completed the barge by June 30, 1981. (App. pp. 3a, 25a) Indeed, the barge was not substantially complete until March 16, 1982. (App. pp. 3a, 18a, 26a) As it turned out, when the barge was finally ready, the tug still was not. Until March 16, 1982, however, Sun's delay in completing the barge was due entirely to Sun's own failures; the tug delay was not a factor. (App. pp. 18a, 22a,

26a) Therefore, Sun's delay from June 30, 1981 to March 16, 1982 was not excused. (App. pp. 19a, 22a)

Initially, the parties agreed that Sun was obligated to pay liquidated damages during a period of concurrent delay in performance by Sun and Halter. Thus, Sun voluntarily paid C and H liquidated damages at the rate specified in the contract, for the period from June 30, 1981 through January 10, 1982, the date it claimed it had needed the tug to begin mating. (App. pp. 3a, 18a) Sun made those payments knowing that the tug would not actually be available until at least March 1982. Sun then changed its mind, claimed it owed nothing, and this lawsuit ensued.

After a trial, the special master held that Sun's failure to complete the barge by June 30, 1981 was not excused, that the liquidated damage clause was valid under Pennsylvania law, and that Sun was required to pay liquidated damages from June 30, 1981 date until March 16, 1982, the date on which the barge was substantially complete. (App. pp. 17a-27a) The district court concurred and adopted the master's Findings of Fact and Conclusions of Law. (App. p. 15a) The Ninth Circuit affirmed the decision (App. p. 1a) and denied Sun's petition for rehearing (App. 13a)

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SUMMARY OF ARGUMENT

Sun raises no federal issue. Most of its arguments address the unique facts of this case. To the extent Sun's Petition presents any legal issues, they arise solely under the law of Pennsylvania. This Court does not sit to find facts. And it does not sit to decide state law issues; indeed, Sun cites the very cases that say so.

Moreover, on the merits, Sun's legal and factual arguments fail. First, the Ninth Circuit, like the district court and the special master before it, followed the very test Sun advocates as the Pennsylvania standard for evaluating liquidated damages clauses. Sun simply quarrels with the lower courts' consistent rejection of its factual contentions. Second, the Ninth Circuit properly declined to follow Sun's "multiple causation" authorities (most of them, ironically, from outside Pennsylvania) as inapposite because they did not deal with the unusual problem of "concurrent defaults." (App. p. 7a) Third, far from deviating from contract interpretation principles, the Ninth Circuit adhered to them by refusing to "rewrite the contract" as Sun requested. (App. p. 4a) Finally, there is not a single case in *any* jurisdiction that has ever applied Sun's supposed "one satisfaction" rule to awards based on liquidated damage agreements. Sun's "rule" defies the very purpose of liquidated damage agreements to fix damages in advance to avoid difficulty in proving damages later. There is no reason to grant review.

ARGUMENT

I. THE SUPREME COURT DOES NOT SIT TO REVIEW ISSUES OF STATE LAW.

As Sun itself concedes, "standing alone, a challenge to state-law determinations by the Court of Appeals would rarely constitute an appropriate subject of this Court's review." *Haring v. Prosise,* 462 U.S. 306, 314 n.8 (1983) (Pet. at 9) Indeed, this Court has echoed that theme again and again. *See, e.g., Burks v. Lasker,* 441 U.S. 471, 486

(1979) ("We did not grant certiorari to decide a question of state law."); *Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967) ("We do not ordinarily review the holding of the Court of Appeals on a matter of state law, and we find no reason for departing from that tradition in this case").[2] The Court is particularly reluctant to review a pure state law issue where, as here, both the district court and the Court of Appeals apply the same law. *See Bishop v. Wood*, 426 U.S. 341, 346 (1976) ("[T]his Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion.").

As Sun also concedes, the Court will depart from this rule only in the exceptional case where the "Court of Appeals is so *egregiously* in conflict with an *important* local law as to call for the Court's power of supervision." (Pet. at 9 (*citing* J. Moore, 18 *Moore's Federal Practice*, ¶ 817.25-1[3], at SC17-30(1985) (emphasis added))[3] There

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[2] Indeed, in 1980 when the Court restated in Rule 17.1 the considerations governing review on certiorari, it deleted a provision in the predecessor Rule 19(1)(b) that suggested review might be proper when a Court of Appeals' decision resolved "an important state or territorial question in conflict with applicable state or territorial law."

[3] Sun goes back 50 years to find a case in which the Court reviewed a state law issue. *Six Companies of California v. Joint Highway District No. 13*, 311 U.S. 180 (1940) (Pet. at 9). And Sun suggests the Ninth Circuit's decision "brazenly flout[s]" state law more than any intervening case. (*Id.*) If anything is "egregious," it is Sun's hyperbole. Moreover, and ironically, *Six Companies* is itself a good example of why the Court should refrain from deciding issues of state law. The Court's interpretation of California law in *Six Companies* was later rejected by the California courts. *See Pacific Employers Insurance Co. v. Berkeley*, 158 Cal. App. 3d 145, 153-56 (1984).

is nothing remotely important or egregious about this case. It concerns Pennsylvania liquidated damages law in cases of concurrent defaults by parties subject to separate liquidated damages obligations. This is not an "important" question of local law, or any law. Indeed, only two cases have ever addressed this factual circumstance, neither of them from Pennsylvania. The case is unimportant to state law jurisprudence and is utterly irrelevant to federal law.

As to Sun's claim that the decision here is "egregious," Sun is fooling itself and the Court. Only a single, lower court Pennsylvania case interprets the law as Sun does, and the Court of Appeals did not even depart from that case. Even if it had, there is plenty of authority for a different interpretation of the law. There is nothing wrong, let alone "egregious," about the Ninth Circuit's decision, and nothing to review.

II. THIS IS NOT AN EXCEPTIONAL CASE THAT WARRANTS THIS COURT'S REVIEW.

Sun claims that the Court of Appeals "openly rejects Pennsylvania law" on the enforceability of liquidated damages clauses. (Pet. at 8) This is inexcusably false. Far from openly rejecting Pennsylvania law, the very first paragraph of the Ninth Circuit's decision states: "Interpreting a contract which provides for construction by the law of Pennsylvania, we apply Pennsylvania law." (App. p. 1a) The Court did exactly what *Erie Railway Co. v. Tompkins,* 304 U.S. 64 (1938), requires it to do; it looked to Pennsylvania law and applied it. Sun's contrary argument is frivolous.

A. There Is No Reviewable Issue on the Standards for Assessing the Validity of Pennsylvania Liquidated Damage Clauses.

Sun's first argument seems to be that the Ninth Circuit failed to follow the rule in *Unit Vending Corp. v. Tobin Enterprises*, 194 Pa. Super. 470, 473, 168 A.2d 750 (1961) (Pet. at 14).[4] *Unit Vending* holds:

> If the amount of damages assessed is subsequently adjudged *unreasonable* in the light of either anticipated *or* actual harm, the contractual provision will be voided as a penalty.

168 A.2d at 751 (emphasis added). It is the only Pennsylvania case that so interprets the law.[5]

Contrary to Sun's suggestion, the court of appeals here applied the very test that *Unit Vending* purports to adopt and that Sun advocates. Although the court noted that "the choice of the disjunctive [in the UCC and the

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[4] Of course, Sun never comes out and says that. (Pet. at 14) And Sun can't. The Ninth Circuit applied the very test Sun advocates; Sun simply complains that the decision didn't "explicitly" find that the liquidated damage clause met both the "anticipated harm" and "actual harm" prongs of the test. (Pet. at 14) An instance of unclear expression, if there were one, would not be worthy of the Court's attention.

[5] Sun argues that other Pennsylvania cases have held the conjunctive "test" in *Unit Vending* to be the law in Pennsylvania. (Pet. at 12) Its cases belie the claim. *Silco Vending Co. v. Quinn*, 315 Pa. Super. 367, 461 A.2d 1324, 1327 n.4 (1983), does not mention *Unit Vending*, does not describe a conjunctive test, and does not even consider the appellant's claim that the absence of actual damage (no anticipated damage is even discussed) voided the liquidated damages clause as a penalty. *Harris v. Dawson*, 239 Pa. Super. 316, 360 A.2d 706 (1976), does not apply a conjunctive test; indeed, it cites Restatement § 339, which does not consider actual damage at *all*.

Restatement] appears to be deliberate," it held that "the question is not settled by these authorities which must be read in the light of common law principles already established and accepted in Pennsylvania." (App. p. 5a) It explicitly held that at the time of contracting the "liquidated damages of $17,000 a day were completely reasonable." (App. at 5a)[6] If, as Sun claims, the Ninth Circuit had rejected the supposed rule of *Unit Vending,* it would have ended the decision there. It didn't. Rather, it went on to review the amount of actual damage (App. p. 8a); recognized that C and H had suffered at least $300,000 in actual damages but that "the exact damages caused its manifold operations by lack of the [ITB] are . . . difficult of ascertainment" (App. p. 9a); and held the parties to their bargain.[7] (App. pp. 8a-9a) There is no conflict with any Pennsylvania law here.

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[6] Sun's contrary argument that the clause was intended only to serve an *in terrorem* effect raises a factual dispute that the Court will not review. *See United States v. Johnston,* 268 U.S. 220, 227 (1925) ("we do not grant certiorari to review evidence and discuss specific facts"); *NLRB v. Hendricks County Rural Electric Corp.,* 454 U.S. 170, 176 n.8 (1981) (improvident grant of certiorari on cross-petition that presented primarily a question of fact "which does not merit the court's review."). Moreover, the authority Sun cites, *Priebe & Sons, Inc. v. United States,* 332 U.S. 407 (1947), supports C and H, not Sun. It holds that "the fact that the damages suffered are shown to be less than the damages contracted for is not fatal. [Liquidated damages] provisions are judged *as of the time of the making of the contract.*" 332 U.S. at 412 (emphasis added). Under *Priebe,* C and H wins because the Ninth Circuit held that at the time of contracting the "liquidated damages of $17,000 a day were completely reasonable." (App. at 5a)

[7] Sun quarrels with this result, claiming that the Ninth Circuit "adopted a sort of 'uncertainty' test that is not known to Pennsylvania law." (Pet. at 17) The court did no such thing. It

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Even if the court had departed from *Unit Vending*, that would be entirely proper. A state intermediate appellate court's decision is merely "a datum for ascertaining state law" and is not determinative if the federal court "is convinced by other persuasive data that the highest court of the state would decide otherwise." *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 237 (1940). There is plenty of "persuasive data" here to support a contrary interpretation. We need look no further than the Pennsylvania liquidated damages statute, which, as Sun concedes, is cast in the disjunctive. (Pet. at 12)

> Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated *or* actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy.

12A Pa. Cons. Stat. Ann. 2-718(1) (Purdon 1970) (emphasis added). Moreover, the Restatement (Second) of Contracts, which Sun says "has been adopted in Pennsylvania" (Pet. at 19), also states that the test is disjunctive.

> The amount fixed is reasonable to the extent that it approximates the actual loss that has resulted from the particular breach, even though it may not approximate the loss that might have been anticipated under other possible breaches. Furthermore, the amount fixed is reasonable to the extent that it approximates

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simply found that where Sun had not shown with certainty the supposed dearth of actual damages, it failed to carry its burden of proving the liquidated damages clause invalid. *See, e.g., Jennie-O Foods, Inc. v. United States*, 580 F.2d 400, 414 (Ct. Cl. 1978); *Harbor Island Spa v. Norwegian American Line A/S*, 314 F. Supp. 471, 474 (S.D.N.Y. 1970).

> the loss anticipated at the time of the making of the contract, even though it may not approximate the actual loss.

Restatement (Second) of Contracts § 356 comment b (1979). And the First Restatement, which *Unit Vending* purports to follow, 168 A.2d at 751, does not consider actual damages at all.[8] *See* Restatement (First) of Contracts § 339 (1932). In short, *Unit Vending* appears to be no more than a carelessly written intermediate appellate decision that inadvertently altered the test of the authorities it set out to follow. Had the Ninth Circuit rejected it, that would have been entirely proper.

As for Sun's argument that the Ninth Circuit followed an English case "which appears never to have been cited, let alone followed by any other American court" (Pet. at 13), Sun apparently has not read even its own cases. One of the key cases that Sun cites as applying an approach similar to Pennsylvania's (Pet. at 14, 15, 21, 27), *Priebe & Sons, Inc. v. United States,* 332 U.S. 407 (1947), cites the English case with approval. 332 U.S. at 411 (*citing Clydebank Engineering & Shipbuilding Co. v. Castaneda,* [1905] A.C. 6, 11-13, 20). Another of Sun's authorities, Professor Corbin, cites *Clydebank* in five different sections concerning damages in his treatise on contract law. *See* 5 A.L. Corbin, *Corbin on Contracts*

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[8] Sun argues that *Unit Vending* is the law because its supposed conjunctive test was cited in *Finkle v. Gulf & Western Mfg. Co.,* 744 F.2d 1015, 1021 (3d Cir. 1984). But *Finkle* also cites the Section 339 of the *First* Restatement (not Section 356 of the Second Restatement, as Sun suggests (Pet. at 19 n.14)) and appears to apply a disjunctive test, rejecting the plaintiff's liquidated damage claim because the clause could not meet either prong of the test.

§§ 1004, 1038, 1060, 1061, 1072 (1964). *See also United States v. Le Roy Pyal Co.,* 186 F.2d 460, 463 (3d Cir. 1950), *cert. denied,* 341 U.S. 926 (1951) (*citing Clydebank*); *Garfield & Proctor Coal Co. v. Pennsylvania Coal & Coke Co.,* 84 N.E. 1020, 1023 (Mass. 1908) (same); *Morrison v. Richardson,* 80 N.E. 468, 469 (Mass. 1907) (same).

Finally, Sun claims that "the need for uniformity in this area compels this Court's review" (Pet. at 11). Sun is talking out of both sides of its mouth. From one side it says the Ninth Circuit had no "power to formulate a rule of decision" different from one Pennsylvania court's plainly mistaken reading of a disjunctive statute as conjunctive. (Pet. at 13) From the other side it says that "uniformity" among the jurisdictions is critical. (Pet. at 11) Obviously, Sun will say anything it thinks will serve its interest, however inconsistent and misleading.

B. Sun's "Multiple Cause" Argument Is a Non-Issue.

Throughout this litigation, Sun has had a single central argument: that even though it was nine months late in delivering the barge, it should be excused from its promise to pay liquidated damages because the tug was even later. It has resurrected this argument in two guises here.[9] First, it claims that C and H, the only innocent party, was responsible for the late tug and cannot recover. Second, it argues that Halter alone is responsible

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[9] Actually, it appears in three guises. The argument is also the basis for Sun's claim that the parties did not anticipate losses if both the barge and the tug were late, a factual contention soundly rejected by all courts below. (Pet. at 15)

for the damage. Three tribunals have considered and rejected the various incarnations of Sun's everybody-but-me argument. There is no reason whatever for this Court to review it.

1. Sun's Argument that C and H Caused Its Own Injury.

Sun says that the Ninth Circuit "did not dispute" that C and H was "its own general contractor." (Pet. at 16) From this premise, Sun constructs an argument that C and H can be charged with responsibility for Halter's delay and therefore cannot recover under Pennsylvania case law prohibiting a party's recovery of liquidated damages for "delay caused by its own actions." (Pet. at 18) Sun chastises the Ninth Circuit for failing to address these cases. (Pet. at 16)

Sun's argument is misleading, to say the least. It implies that the Ninth Circuit resolved the facts in Sun's favor, but misapplied the law. In fact the opposite is true. The Ninth Circuit did *not* find that C and H caused *any* delay. Indeed, *none* of the courts found that. Even as to Halter's delay, the master expressly found that "[p]rior to March 16, 1982, tug unavailability *did not actually cause any delay* in the performance of any of the Contract Work by Sun Ship" (App. at 26a), and both the district court (App. p. 14a) and the Ninth Circuit affirmed that finding. (App. p. 3a).[10] Thus, there was no reason to look at Sun's cases.

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[10] Sun equates the courts' finding that Sun was excused from "mating" and "sea-trials" (App. pp. 16a, 26a) with a finding that

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Sun now wants this Court to sift through the facts and reach a different conclusion. That is not this Court's proper function in any case. *See United States v. Johnson, above,* 268 U.S. at 227; *NLRB v. Hendricks County Rural Electric Corp.,* above, 454 U.S. at 176 n.8. It is especially inappropriate where, as here, a special master, the district court and the appellate court *all* agree on the facts. *Graver Tank & Manufacturing Co. v. Linde Air Products Co.,* 336 U.S. 271, 275 (1949) ("a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error"). Here, Sun does not even make a pretense of showing error. Its entire argument is premised on the fiction that the Ninth Circuit found C and H to be "its own prime contractor." Sun's distortion of the findings to create an illusory legal issue is a reason for sanctions, not review.

2. Sun's Claim That Injury Would Have Happened Anyway.

Sun's unspoken premise is that two wrongs make a right—that where two concurrent defaults cause an injury, neither wrongdoer can be held liable. (App. p. 7a) Sun asserts that it did not cause C and H's injury resulting from the delayed ITB, because the same injury

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C and H was responsible for the delay in the delivery of the tug. (Pet. at 18) The two have nothing whatever to do with one another. Sun was excused from "mating" and "sea trials" because C and H failed to prove that Sun could not have completed these tasks, had the tug been available, by the time the barge was finally finished on March 16, 1982.

would have occurred as a result of Halter's delay. (Pet. at 19) Of course, as the Ninth Circuit noted, the same argument is available to Halter during Sun's delay. (App. p. 7a) Thus, the result of Sun's argument is that the innocent party has no remedy for the entire period of delay caused by concurrent breaches of contract. In other words, under Sun's causation theory, if Sun were late by nine months and Halter by nine months and one day, then C and H would have no claim against Sun and a claim for only one day of delay against Halter.

All the judges in this case rejected this unfair theory.[11] The Ninth Circuit held that "[t]he continued default of both parties would operate to take each of them off the hook. That cannot be the law." (App. p. 7a) The special master and the district court agreed. (App. p. 14a, 20a)

Only two liquidated damage cases before this one have addressed concurrent breach situations. Like the Ninth Circuit, both rejected Sun's proferred rule as unfair. *See Parker-Washington Co. v. Chicago,* 107 N.E. 872 (1915); *Manufacturers Casualty Ins. Co. v. Sho-Me Power Co.,* 157 F. Supp. 687 (W.D. Mo. 1957). Where there are only two on-point cases in the history of American jurisprudence, Sun's claims that the Ninth Circuit erred (Pet. at 21) and that the issue is of "critical importance to the construction industry" (Pet. at 27) are insupportable.

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[11] Sun says that "Pennsylvania does not let defaulting parties off 'scot-free', but rather apportions the *actual* damages between them." (Pet. at 21) (emphasis in original)). Sun is playing games again. Its "critical path" argument is a causation argument (Pet. at 21-22), available to *both* parties. Without causation there can be no liability for the period of concurrent delay. (App. p. 7a) Sun's claim that its distorted rule affords C and H a remedy is a sham.

As Sun's reliance on non-Pennsylvania authorities shows (Pet. at 19-21), there was no Pennsylvania law to inform the court of appeals, let alone to depart from, and the court was more than justified in rejecting a causation theory that rewards the guilty and punishes the innocent.[12] That decision is sensible and sound. There is nothing in it to review.

C. The Court Did Not Violate Any Pennsylvania Law on Construction of Contracts.

Sun argues that the Ninth Circuit violated contract interpretation principles.[13] (Pet. at 24-26) Not true. It is Sun, not the Ninth Circuit, that "annuls" a part of the contract. (Pet. at 24) Sun reads the contract's clear definition of the "Vessel" as "one non-self-propelled oceangoing barge" (App. p. 28a) right out of the agree-

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[12] Sun's authorities (Pet. at 19-21) do not represent Pennsylvania law and are irrelevant. Sun links one with the other to create a chain leading to Pennsylvania law. (*Morris* = *Priebe* = *Massman* = Restatement § 356 = Pennsylvania law.) Pet. at 21) But *Morris Mechanical Enterprises, Inc. v. United States*, 554 F. Supp. 433 (Ct. Cl. 1982), was decided under general principles, not Restatement § 356 or Pennsylvania law. *Priebe*, above, was decided before *Erie* under general common law principles and supports C and H, not Sun. The "rule" of *Massman Construction Co. v. Greenville*, 147 F.2d 925 (5th Cir. 1945), is dictum in a case in which "the delay attributed to the contractor was for causes beyond its control." 147 F.2d at 928. And, most important, neither these cases nor Restatement (Second) of Contracts § 356, illustration 4 addresses concurrent breaches. (App. p. 7a)

[13] Ironically, although Sun says the Ninth Circuit violated the principle that contracts must be viewed "as a whole" (Pet. at 24), Sun provides only contract excerpts to the Court, selectively omitting provisions that C and H cited below. (App. pp. 28a, 37a, 40a) Obviously, Sun has little genuine regard for the need to look at the contract "as a whole."

ment. (Pet. at 24) The Ninth Circuit recognized that Sun's reading would "require the court to rewrite the contract," and declined to so violate the law. (App. p. 4a)[14]

More importantly, any error of contract interpretation would not be a matter for this Court's review. It would affect only two parties and would have no effect at all on the jurisprudence of Pennsylvania, let alone federal law. This is the kind of issue that no party should even try to bring before this Court.

D. The One Satisfaction Rule Is Irrelevant.

Sun could not muster a single liquidated damages case from *any* jurisdiction to support its argument that its liquidated damage liability should be reduced by the settlement of Halter's separate liquidated damages liability. That is because there is no such case; the "one satisfaction" rule applies only where the extent of the injured party's damages is readily ascertainable and subject to an action for actual damages. Liquidated damages cases necessarily are different, and the "one satisfaction" rule doesn't apply. To impose the "one satisfaction" rule in liquidated damages cases would negate the parties' negotiated agreements and would conflict with the very purpose of liquidated damages—to fix in advance compensation for harm that is difficult to calculate.

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[14] Likewise, Sun argues that there was no delivery date stated, when in fact the contract required Sun to "deliver" the "Vessel" (defined as the barge) on "June 30, 1981." (Pet. at 25; App. p. 29a) Sun's other contract "interpretations" are equally tortured and don't deserve discussion. (Pet. at 24-26)

Sun promised to pay liquidated damages for each day of its unexcused delay in performing its contract obligations. Halter did the same. C and H's anticipated damages from delay in delivery of the ITB exceeded the *total* liquidated damages it would receive if *both* Halter and Sun breached. The parties allocated the risk of loss through negotiated agreements, and Sun's own documents and witnesses admitted that each liquidated damages was valid and enforceable without reference to the other.

Sun, a far larger company than C and H, bargained for a liquidated damages clause to limit its own liability. It cannot, now that it finds its agreement inconvenient, invoke doctrines applicable to precise calculation of damages to further reduce the exposure it freely agreed to.

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CONCLUSION

There is no federal issue here, nor any violation of state law rules ("egregious" or otherwise) that might conceivably counsel review. The Ninth Circuit's decision is responsible and correct; Sun's Petition is frivolous. Accordingly, C and H respectfully requests the Court to deny Sun's Petition and grant C and H's motion for damages.

Respectfully submitted,

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